Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1110

Park City Utah Corporation, Petitioner

VS.

E.A. Russell and Martell E. Russell, Respondents.

# PETITION FOR WRIT OF CERTIORARI

TO THE UTAH SUPREME COURT

* * * * * *

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Park City Utah Corporation, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Utah Supreme Court entered in the above-entitled case on April 8, 1976 .

OPINION BELOW

The opinion and judgment of the Utah Supreme Court is reported as 548 P.2d 889 and is printed in Appendix A hereto, infra, pages 1 through 5.

JURISDICTION

The judgment of the Utah Supreme Court (Appendix A, infra, page 1) was entered on April 8, 1976. A timely petition for rehearing was denied on May 4, 1976, (Appendix A, infra, page 6). The jurisdiction of the United States Supreme Court is invoked under the due process and equal protection clauses of the 14th Amendment to the United States Constitution.

QUESTIONS PRESENTED

While disregarding the true record before them, the Utah Supreme Court fabricated its own evidence and then invented a non-existent false controversy purportedly between the litigating parties. On such fictional basis said Court applied the law against your petitioner herein depriving the latter of its right to purchase approximately 2000 acres of valuable land.

STATUTE INVOLVED

Petitioner relies on the due process and equal protection clauses of the 14th Amendment in

the United States Constitution, to the effect that petitioner was entitled to due process "in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights "(Rees v. City of Watertown, 86 U.S. 107; Endicott-Johnson Corp. v. Encyclopedia Press, 266 U.S. 285); and, petitioner was likewise entitled to the same and equal protection of said "rules and forms" as applied to all other litigants similarly situated in proceedings before the Utah Supreme Court.

STATEMENT OF CASE

At issue is the interpretation of a certain written Lease and Purchase Agreement, identified in the Utah Supreme Court as "Exhibit 11".

From a lower state court's judgment against petitioner, (the successor of the Lessee under said agreement) the latter appealed to the Utah Supreme Court. The issues were generally divided between a leasehold forfeiture question and the severability of certain land purchase privileges (two options



and one first refusal right) running to petitioner. The Utah Supreme Court upheld the lower state court's leasehold forfeiture adjudication, which is not an issue under this petition for a writ of certiorari.

However, said Utah Supreme Court also affirmed the lower state court's judgment, (with one of the five justices dissenting), holding that petitioner's land purchase privileges (two options and one first refusal right) were not severable from the leasehold and were terminated when the lease failed. These three land purchase privileges in favor of petitioner are at issue herein.

In arriving at its decision regarding said land purchase privileges the Utah Supreme Court quotes a provision, purportedly from the aforesaid Exhibit 11, which does not exist (See Appendix A, second quotation, middle of page 5: "Lessee from and after ....." etc.). Appendix B, second paragraph thereof, infra, represents what said Exhibit 11 actually states by disclosing that one-half of the Utah Supreme Court's quotation had been crossed

out and handwritten words inserted by respondents in 1967 when the document was originally executed by the parties.

Predicated on the foregoing non-existent evidence, quoted by said Utah Supreme Court, the latter proceeded to invent a wholly ficticious controversy by claiming: "The parties are in sharp disagreement as to the meaning of the just quoted language of the lease..." (Appendix A, page 5, concluding paragraph thereof). The parties have at no time been "in sharp disagreement", nor in any disagreement whatever, concerning that crucial statement from said Exhibit 11. Nowhere does the record indicate the parties failed to recognize the true language used in Exhibit 11 (Appendix B, second paragraph, infra).

Based upon its own erroneous citing of the evidence and a non-existent issue between the litigants herein, the Utah Supreme Court applied the law which resulted in petitioner's loss of its interest in 2000 acres of valuable land.



## REASONS FOR GRANTING WRIT

Petitioner agrees with the Utah Supreme Court as to which legal principles are appropriately involved in the instant matter.

Petitioner does not agree that legal "rules and forms" (86 U.S. 107; 266 U.S. 285; supra), which are applied uniformly in not just Utah but also throughout the entire United States and its possessions, can be ignored as to petitioner's cause. Nowhere in such jurisdictions may any court manufacture its own evidence, fabricate a controversy between the litigants and thereupon apply the law as the Utah Supreme Court has done herein.

It is so fundamental that only the litigants can present evidence and the factual issues in civil lawsuits, that further elaboration is unnecessary.

Thus, petitioner has no quarrel as to the Utah Supreme Court's view of the law. However, petitioner is entitled to have said law applied

to the true, uncontroverted provisions of the written instrument involved (Appendix B, second paragraph, infra), and not to the improvisation invented by said court (Appendix A, second quotation, middle of page 5, infra.) upon which it based its decision (Appendix A, concluding paragraph, page 5, infra).

CONCLUSION

The very fact that the Utah Supreme Court was apprised of its gross errors in petitioner's Petition for Rehearing and then denied the same out-of-hand (Appendix A, Page 6, infra) even before a reply brief was forthcoming from the respondent herein, indicates a prejudice against your petitioner.

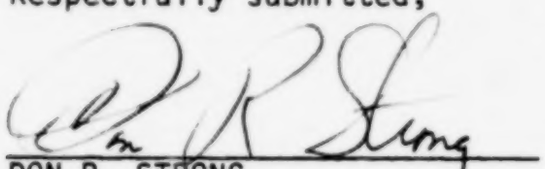
Petitioner respectfully implores this Court to act on its own by: (1) granting the within petition for a writ of certiorari; (2) thereafter, applying the law as spelled out by the Utah Supreme Court in its decision (Appendix A, Page 4, infra); and, (3) applying said law to



the clearly expressed actual language agreed upon by the parties to the subject written instrument herein.

Therefore, petitioner urges this Honorable Supreme Court to ultimately reverse or modify the state court's judgment (36 C.J.S. Federal Courts, Section 281, at Page 772) by reviewing the findings of fact herein and applying the appropriate rule of Utah law thereto (United Gas Public Service Co. v. Texas, et al., 303 U.S. 123).

Respectfully submitted,



DON R. STRONG
Counsel for Petitioner
197 So. Main Street
Springville, Utah 84663

July 2, 1976.

CERTIFICATE OF SERVICE BY MAIL

The undersigned member of the Bar of the Supreme Court of the United States and counsel of record for petitioner herein, hereby certifies that the respondent was served with three copies of the foregoing petition, whereby the same were deposited in the United States Post Office, Salt Lake City, Utah, with first class postage prepaid, properly addressed to respondent's counsel of record as shown upon the cover hereof, there being no other parties to be served herein, on this 5th day of July, 1976.

DON R. STRONG
197 South Main Street
Springville, Utah 84663





IN THE SUPREME COURT OF THE STATE OF UTAH

E.A. RUSSELL and MARTELL E. RUSSELL,
Plaintiffs and Respondents,

v.

PARK CITY UTAH CORPORATION, et al.,
Defendants and Appellant.

No. 14124
FILED
April 8, 1976

Allan Mecham,
Clerk

CROCKETT, Justice:

Plaintiffs Russell sued to terminate all rights of defendant Park City Utah Corporation in a lease for non-payment of rent. Plaintiffs' motion for summary judgment was granted, and defendant appealed. We remanded for trial.[1] From a judgment terminating both the lease and an option to purchase contained therein, defendant appeals, contending that there was no termination of the lease, and that even if there was, the option to purchase did not fall with it.

Defendant's predecessor obtained a ten-year lease with an option to purchase on March 31, 1967. On July 31, 1967, defendant's predecessor subleased the land, located in Summit and Salt Lake Counties, to Robert W. Ensign, who, within the next two or three months, assigned the lease to Ski Park City West, Inc., herein called Park West, which has since been in possession.

The lease covered some 1,987 acres, and called for rental payments of $2.50 per acre per year. Defendant was to develop the land as a ski resort by clearing runs, installing lifts and other facilities. (Plaintiffs reserved the right to graze their sheep on the land every year between May 15 and November 1). The lease contained this provision, in Paragraph VIII, as to the foreiture: "No default of Lessee in any of the provisions hereof shall constitute a basis for forfeiture of this lease unless the same shall continue for more than forty-five (45) days after written notice to Lessee specifying of what the default consists, and in the event Lessee fails to correct said default within

(1. Russell v. Park City Utah Corp., 29 U2d 184, 506 P2d 1274, 1973)

such further time as is reasonably necessary to cure same, Lessee shall quit and surrender the premises to Lessor..."

The option to buy provided that the lessee had the exclusive option to buy 35 acres of property at $300 per acre, exercisable before Nov. 15, 1967. After that date, the lessor had the right to sell any part of the land, subject to the lessee's right of first refusal at the same price any third party should offer. Par. VI of the lease provided that the lessees (defendants) would deposit $2,000 with plaintiffs as consideration for the option, in addition to all other covenants in the lease, and that, if the option was not exercised before Nov. 15,1967, the deposit would be applied to the rental payments for 1967. The defendant exercised the option as to part of the land in May, 1967.

The annual rental payments were made for 1967, 1968 and 1969. Late in 1970 a dispute arose between defendant and its sublessee, Park West, as to money owed by the latter to defendant. The defendant instructed Park West to make payments directly to Plaintiffs, but Park West refused. The defendant failed to make the rental payment on Nov. 1, 1970, as required. In February, 1971, the defendant again instructed Park West to make its payments to plaintiffs, and again Park West refused. On March 11, 1971, plaintiffs sent a letter to defendant stating that if the rent was not paid within 45 days, they would declare the lease terminated. In a letter dated March 29, 1971, plaintiffs' attorney reaffirmed the letter of March 11, and set April 26, 1971, (45 days from March 12) as the deadline for payment. The defendant did not meet that demand, but on June 7, 1971, tendered payment which the plaintiffs refused.

It was on those facts that the trial court granted the plaintiffs' motion for summary judgment. We reversed because there were disputes concerning the defendant's receipt of the letter and other circumstances pertaining to the forfeiture. After remand and upon trial, the court found the disputed issues in favor of the plaintiffs and that the lease had



been terminated in accordance with its terms.

Defendant now argues that the procedure followed by the plaintiffs, giving it only 45 days to remedy its default, was not in conformity with Par. VIII of the lease quoted above, which gives it the 45 days after written notice, plus "such further time as is reasonably necessary to cure" the default. Under the findings and determination made by the trial court we do not confront the question as posed by the defendant. The notice was received on March 12, 1971, and the trial court found that the defendant made no attempt to pay the rent during the 45 day grace period, or during the following six weeks until the tender of June 7, 1971. The problem here is not what plaintiffs would or should have done if the defendant had made the tender at some earlier time. We are of the opinion that there is a reasonable basis in the evidence for the trial court's finding that the tender was not made within a reasonable time and that the plaintiffs were justified in refusing the tender and terminating the lease.

It is true, as defendant argues, that forfeitures are not favored in the law, and that forfeiture provisions will be strictly construed against the one who seeks to enforce them.[2] But it is also true that parties are free to contract according to their desires in whatever terms they can agree upon; and further, that the contract should be enforced according to its terms, unless that result is so unconscionable that a court of equity will refuse to enforce it. [3] No such circumstances appears to exist here.

The foregoing affirmance of the termination of the lease cuts the foundation out from under the defendant's argument that the plaintiffs had waived their right of forfeiture of the lease by accepting rent from defendant's sublessee, Park West. It is true that the latter had been the sublessee of the defendant and had been in possession of the property practically from the beginning of the lease term.

(2. Green v Palfryman,166 P2d 215; 3. Jacobson v. Swan, 278 P2d 294, Perkins v Spencer,243 P2d 446, and cases cited therein)

Nevertheless, after the lease was terminated as delinated above, the plaintiffs were free to rent the property to Park West or anyone else, as the trial court correctly ruled.

The other aspect of this case relates to the options to purchase given to the lessee (defendant). Par. VI of the lease provided: "Lessors give and grant to Lessee the exclusive option to purchase (35) thirty-five acres of property..This option to purchase shall be exercised by Lessee on or before the 15th day of Nov. 1967...". The defendant did exercise this option as to part of the 35 acres before Nov. 15, 1967. The problem of more critical concern here involved the provision, referred to above, which granted to the defendant the "first right of refusal" to purchase any part of the land during the "entire term" of the lease. We note awareness that what is often called "the right of refusal" is not the same as an option, wherein the optionee has a definite right to purchase, whereas, the right of refusal has no effect until and unless the party granting it (plaintiffs here) decides to sell. If he does so decide, then the right of refusal does become an option in that its possessor has the first opportunity to purchase the property at the price at which the owner will sell to anyone.[4] In this instance, for the purpose of determining whether this right of refusal survived the termination of the lease, we think the same rule applies as that which governs options contained in leases: that is, if by the express terms of the option, it can be seen as independent of the other covenants of the lease, and is supported by a valid consideration, it can continue in existence not withstanding the lease's termination.[5]

There are two provisions of the lease which have a bearing on the problem. Paragraph VI of the lease reads:

> " As a further consideration for the above option, and other privileges to purchase hereinafter recited, and in addition to the other cov-

(4. Chournos v. Evona Investment Co.,93 P2d 450;
5. Prout v. Roby, 82 U.S.(15 Wall) 471; generally, 10 ALR 2d 884, Anno...Tenant's Option to Purchase)



> enants and conditions contained in this agreement, Lessee agrees and herewith deposits with Lessors the sum of $2000.00 cash....."

To be considered in connection with the foregoing is the provision of the next paragraph, No. VII, which states:

> "Lessee from and after the 1st day of November, 1968, has the irrevocable right to purchase all or a portion of the subject property not theretofore purchased by Lessee from Lessors...said right of purchase to remain in existence during the entire term of the lease."[All emphasis herein added].

The parties are in sharp disagreement as to the meaning of the just quoted language of lease, particularly the emphasized portion. Defendant's position is that the covenant that the right of purchase shall exist "during the entire term of the lease" is a severable covenant, supported by separate consideration, and exists independently of the other provisions of lease for the entire 10 year term thereof. Whereas, plaintiff contend to the contrary and that it was intended as an integral part of the total composite of the lease; and when the lease was forfeited and terminated, this covenant fell with it. In view of the lack of certainty in the language of lease, the trial court was justified in admitting extraneous evidence as to what was intended.[6] This was done and on disputed evidence, the court found in accordance with plaintiffs' position as just stated. AFFIRMED. Costs to plaintiffs (respondents).

WE CONCUR: F. Henri Henroid, Chief Justice; A.H. Ellett, Justice; R.L. Tuckett, Justice.

DISSENTING: Maughan, Justice....Given the language of Par.VI of lease, that the $2000 cash was further consideration for option, and in addition to the other covents, I am of the opinion that the covenant controlling the option was independent; and thus not dependent on the subsistence of the lease.

(6. Penn Star Mining Co. v. Lyman,231 P 107; Ewell & Son, Inc. v. Salt Lake City Corp., 493 P2d 1283).

SUPREME COURT OF UTAH, STATE OF UTAH

Salt Lake City,
Utah

Office of the Cerk

May 4, 1976

Don R. Strong, Esquire
Attorney at Law
197 South Main Street
Springville, Utah 84663

E.A. Russell and Martell
E. Russell,
Plaintiffs and Respondents

vs. No. 14124

Park City Utah Corporation, et al.,
Defendants and Appellant.

This day petition for rehearing denied; case remitted to Summit County.

Allan E. Mecham,
CLERK

BEST COPY AVAILABLE



[THIS IS FINAL PAGE 5, OF LEASE AND PURCHASE AGREEMENT, EXHIBIT "11", IN THE UTAH SUPREME COURT]



include the value of any improvements placed on or within said property by Lessee. The expense of said appraisal to be paid by the party employing the appraiser.

Lessee ~~from and after the~~ day of ~~October~~ November, 1976 has the ~~irrevocable right~~ OPTION to purchase all or a portion of the subject property not theretofore purchased by Lessee from Lessors at its appraised value and terms as immediately above set forth, ~~said rights of purchase to remain in existence during the entire term of this lease.~~ AT THE TERMINATION OF THE 10 YEAR LEASE TERM, MARCH 31, 1977, LESSEES WILL NOTIFY LESSORS IN WRITING OF THEIR INTENTION TO EXERCISE THIS OPTION 30 DAYS PRIOR TO TERMINATION OF LEASE.

No default of Lessee in any of the provisions hereof shall constitute a basis for forfeiture of this lease unless the same shall continue for more than forty-five (45) days after written notice to Lessee specifying of what the default consists, and in the event Lessee fails to correct said default within such further time as is reasonably necessary to cure the same, Lessee shall quit and surrender the premises to Lessors subject to the reservation contained in paragraph II above. Because of the difficulties in ascertaining the damages that would thus be sustained, if any, by Lessors, it is agreed that Lessee shall pay to Lessors the sum of $2,500 as exclusive, fixed and liquidated damages.

Any and all agreements, covenants and conditions hereinbefore stipulated shall apply to, benefit and bind the heirs, successors, executors, administrators and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the parties to this Agreement have hereunto signed their names and affixed their seals the day and year first above written.

LESSORS

E. A. Russell

Martelle Russell

Robert A. Major, President of
THE MAJOR-BRAKENEY CORPORATION
Lessee herein

BOOK M11 PAGE 383